IN THE

Supreme Court of the United States

No. 77-1213

October Term, 1978

RAUL LLORENTE and
ALVARO DORONZORO,

Petitioners,

v.

PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT AND TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE
UNITED STATES SUPREME COURT
Term, 1978

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v.

PEOPLE OF THE STATE OF NEW YORK

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT AND TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To: The Honorable Chief Justice and the Honorable Justices of the Supreme Court of the United States

The petitioners, by Charles Sutton, their attorney, respectfully petition this Court for a Writ of Certiorari to the Appellate Division, First Department, of the Supreme Court of the State of New York and to the Court of Appeals of the State of New York.

STATEMENT PURSUANT TO U.S. SUPREME COURT RULE 23, 28 U.S.C.A.

The separate order sought to be reviewed by each petitioner respectively was made by the Supreme Court of the State of New York, Appellate Division, First Department dated and entered April 19, 1977. The official report of the memorandum decision upon which each said order was made appears at 57 A.D.2d 526. The unofficial report appears at 393 N.Y.S. 2d 575. It is appended at pp. 8a, infra. Each petitioner timely moved that court for leave to reargue the said appeal. That court denied leave to appeal, without opinion, by order dated June 16, 1977. The order was not reported. It is appended at pp. 11a, infra. Each petitioner timely applied to a Judge of the New York Court of Appeals for leave to appeal the order of the Appellate Division dated April 19, 1977 to the New York Court of Appeals. The Honorable Sol Wachtler, an Associate Judge of the New York Court of Appeals denied leave to appeal by a separate certificate as to each petitioner dated December 1, 1977, without opinion. The said certificates as to each petitioner are appended at pp. 15a and 17a infra. The said denials of leave to appeal have not been found as reported to date.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3) in that petitioners have been deprived of their constitutional rights under the Fourteenth Amendment.

QUESTIONS PRESENTED

1. Are the petitioners' constitutional rights violated when the prosecutor, on the appeal by the petitioners from their respective judgments of conviction entered supra plea bargain made in open court

and confirmed by the trial court on the record whereby each petitioner pleaded guilty to one count of his indictment to cover all of the counts of the indictment *with prejudice,* in his brief and on oral argument to that appellate court, demands and obtains an order from the Appellate Division restoring the remaining counts of the indictment for further prosecution, and further prosecutes the petitioners on those other counts, after a successful appeal by the petitioners on the one count of each indictment to which the petitioner pleaded?

2. Are the petitioners' Due Process constitutional rights violated by the breach of the plea bargain agreement by the prosecutor?

3. Is a further prosecution of the indictment against each petitioner barred by the unwithdrawn guilty plea of the petitioner which covered his entire indictment with prejudice?

4. Does a further prosecution in this case violate the petitioners' constitutional rights under the Double Jeopardy provisions of the Fourteenth Amendment?

UNITED STATES CONSTITUTION
Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;* nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sec. 220.30 Plea; plea of guilty to part of indictment; plea covering other indictments

1. A plea of guilty not embracing the entire indictment, entered pursuant to the provisions of subdivision four, five or six of section 220.10, is a "plea of guilty to part of the indictment."

2. The entry and acceptance of a plea of guilty to part of the indictment constitutes a disposition of the entire indictment.

3. (a) Except as provided in paragraph (b) a plea of guilty, whether to the entire indictment or to part of the indictment, may,with both the permission of the court and the consent of the people, be entered and accepted upon the condition that it constitutes a complete disposition of one or more other indictments against the defendant then pending. If the other indictment or indictments are pending in a different court or courts, they shall not be disposed of under this subdivision unless the other courts and the appropriate prosecutors also transmit their written permission and consent as provided in subdivision four of section 220.50; in such a case the court in which the plea is entered shall so notify the other courts which, upon such notice, shall dismiss the appropriate indictment pending therein.

(b) (i) A plea of guilty, whether to the entire indictment or to part of the indictment for any crime other than a class A felony, may not be accepted on the condition that it constitutes a complete disposition of one or more other indictments against the defendant wherein is charged a class A-I or class A-II felony as defined in article two hundred twenty of the penal law or the attempt to commit any such class A-I or class A-II felony.

(ii) Where it appears that the defendant has previously been subjected to a predicate felony conviction as defined in paragraph (b) of subdivision (1) of section 70.06 of the penal law, a plea of guilty, whether to the entire indictment or to part of the indictment, of any offense other than a felony may not be accepted on the condition that it constitutes a complete disposition of one or more other indictments against the defendant wherein is charged a felony.

(iii) A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law.

(iv) A plea of guilty, whether to the entire indictment or to part of the indictment for any crime other than a felony, may not be accepted on the condition that it constitutes a complete disposition of one or more other indictments against the defendant wherein is charged a class A felony, other than those defined in article two hundred twenty of the penal law, or a class B felony.

(v) A plea of guilty, whether to the entire indictment or to part of the indictment for any crime other than a class A-III, class B, or class C felony, may not be accepted on the condition that it constitutes a complete disposition of one or more other indictments against the defendant wherein is charged a class A-III felony.

ARTICLE 40—EXEMPTION FROM PROSECUTION BY REASON OF PREVIOUS PROSECUTION

Sec. 40.10 Previous prosecution; definitions of terms.

The following definitions are applicable to this article:

1. "Offense." An "offense" is committed whenever any conduct is performed which violates a statutory provision defining an offense; and when the same conduct or criminal transaction violates two or more such statutory provisions each such violation constitutes a separate and distinct offense. The same conduct or crimnal transaction also establishes separate and distinct offenses when, though violating only one statutory provision, it results in death, injury, loss or other consequences to two or more victims, and such result is an element of the offense as defined. In such case, as many offenses are committed as there are victims.

2. "Criminal transaction" means conduct which establishes at least one offense, and which is comprised of two or more or a group of acts either (a) so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident, or (b) so closely related in criminal purpose of objective as to constitute elements or integral parts of a single criminal venture.

Sec. 40.20 Previous prosecution; when a bar to second prosecution.

1. A person may not be twice prosecuted for the same offense.

2. A person may not be separately prosecuted for two offenses based upon the same act or criminal transaction unless:

(a) The offenses as defined have substantially different elements and the acts establishing one offense are in the main clearly distinguishable from those establishing the other; or

(b) Each of the offenses as defined contains an element which is not an element of the other, and the statutory provisions defining such offenses are designed to prevent very different kinds of harm or evil; or

(c) One of such offenses consists of criminal possession of contraband matter and the other offense is one involving the use of such contraband matter, other than a sale thereof; or

(d) One of the offenses is assault or some other offense resulting in physical injury to a person, and the other offense is one of homicide based upon the death of such person from the same physical injury, and such death occurs after a prosecution for the assault or other non-homicide offense; or

(e) Each offense involves death, injury, loss or other consequence to a different victim; or

(f) One of the offenses consists of a violation of a statutory provision of another jurisdiction, which offense has been prosecuted in such other jurisdiction and has there been terminated by a court order expressly founded upon insufficiency of evidence to establish some element of such offense which is not an element of the other offense, defined by the laws of this state.

Sec. 40.30 Previous prosecution; what constitutes

1. Except as otherwise provided in this section, a person "is prosecuted" for an offense, within the meaning of section 40.20, when he is charged therewith by an accusatory instrument filed in a court of this state or of any jurisdiction within the United States, and when the action either:

(a) Terminates in a conviction upon a plea of guilty; or

(b) Proceeds to the trial stage and a jury has been impaneled and sworn or, in the case of a trial by the court without a jury, a witness is sworn.

(2) Despite the occurrence of proceedings specified in subdivision one, a person is not deemed to have

been prosecuted for an offense, within the meaning of section 40.20, when:

(a) Such prosecution occurred in a court which lacked jurisdiction over the defendant or the offense; or

(b) Such prosecution was for a lesser offense than could have been charged under the facts of the case, and the prosecution was procured by the defendant, without the knowledge of the appropriate prosecutor, for the purpose of avoiding prosecution for a greater offense.

3. Despite the occurrence of proceedings specified in subdivision one, if such proceedings are subsequently nullified by a court order which restores the action to its pre-pleading status or which directs a new trial of the same accusatory instrument, the nullified proceedings do not bar further prosecution of such offense under the same accusatory instrument.

4. Despite the occurrence of proceedings specified in subdivision one, if such proceedings are subsequently nullified by a court order which dismisses the accusatory instrument but authorizes the people to obtain a new accusatory instrument charging the same offense or an offense based upon the same conduct, the nullified proceedings do not bar further prosecution of such offense under any new accusatory instrument obtained pursuant to such court order or authorization.

Each of the petitioners was indicted by separate indictments returned at the Supreme Court of the State of New York, County of New York, Special Narcotics Parts. The petitioner Llorente was charged in a six-count indictment with one count of alleged conspiracy to possess cocaine and with five counts of possession of cocaine. The petitioner Doronzoro was charged with the same alleged conspiracy, with the same counts of possession of cocaines, and with other counts of possession and sale of cocaine. Each of the indictments charged each of the petitioners with one or more of the same charges of possession of cocaine.

In due course each petitioner moved to suppress the evidence upon which the possession counts of the indictment were based. The motions to suppress the evidence were denied as to each petitioner on the ground that neither petitioner had *standing*, since the evidence was found in an apartment at 38-25 Parsons Boulevard, Queens County, New York, which belonged to a third defendant — under a separate indictment —Alfonso Velasco, with which neither of the petitioners had any connection. Defendant Velasco made a similar motion to suppress the evidence located at two apartments, one at 41-11 Parsons Boulevard, and the other at 38-25 Parsons Boulevard, both in Queens County, New York, on the grounds of unlawful search and seizure. The trial court, after a suppression hearing which it had granted only to defendant Velasco, granted Velasco's motion to suppress the evidence found at 38-25 Parsons Boulevard and denied Velasco's motion to suppress the evidence found at 41-11 Parsons Boulevard. Thereafter, the petitioners and defendant Velasco[1] entered into a plea bargain with the prosecutor which was confirmed in open court on the record and approved and accepted by the trial court. Petitioner Doronzoro agreed to plead guilty to the count of his indictment which charged him with possession of cocaine at the Velasco apartment at 38-25 Parsons Boulevard. Petitioner Llorente agreed to plead guilty to a lesser included count of that charge, namely attempted possession, and to do so under *Alford v. North Carolina*, 401 U.S. 25 (1970).

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[1] Petitioners Llorente and Doronzoro, and defendant Velasco were represented by Charles Sutton, Esq. at the trial court and on the appeal to the Appellate Division. Velasco's judgment of conviction on his plea to a different count of his indictment, namely possession of cocaine at 41-11 Parsons Boulevard, was affirmed by the Appellate Division. He thereafter retained other counsel.

Velasco agreed to plead guilty to the count of his indictment which charged him with possession of cocaine at his apartment at 41-11 Parsons Boulevard.

The prosecutor expressly required and conditioned that all three defendants, Llorente, Doronzoro, and Velasco, must make the plea bargain, otherwise the prosecutor would not make a plea bargain with any of the three defendants. All three agreed to make the plea bargain.

The plea bargain as to each of the three defendants, Llorente, Doronzoro, and Velasco, was that each defendant would plead guilty to one specified count of his respective indictment to cover all of the counts of the indictment *with prejudice*. The agreed sentence was to be one year to life for Llorente and five years to life for Doronzoro and Velasco. The trial court agreed to accept that plea bargain. The agreement of the petitioners, defendant Velasco and the prosecutor was confirmed in open court, on the record, on September 21, 1976 and approved, on the record by the trial court.[2] It was the agreed plea bargain that prosecution of the respective indictments was terminated. See, New York Criminal Procedure Law, Section 220.30 and 40.30.

Separate judgments of conviction were thereafter rendered as to each defendant, Llorente, Doronzoro, and Velasco, on November 3, 1976. Petitioner Llorente was sentenced to a jail term of one year to life; petitioner Doronzoro and defendant Velasco were

[2] Defense counsel had informed the prosecutor that each defendant would appeal from the judgment of conviction entered on that plea. The prosecutor delayed the plea bargain process until after he had reviewed the matter with his superiors and with the Appeals Board of the District Attorney's office. After that consultation, the prosecutor confirmed the plea bargain agreement and the plea bargain agreement was formally made on the record before the trial court.

each sentenced to a jail term of five years to life. Each defendant timely appealed his judgment of conviction to the Supreme Court of the State of New York, Appellate Division, First Department.

On the appeal, the petitioners Llorente and Doronzoro in their respective briefs showed that they each had *standing* to move to suppress the admittedly illegal evidence upon which was based the count of possession of alleged cocaine at the Velasco apartment at 38-25 Parsons Boulevard, Queens County, to which each petitioner had pleaded by reason of *People v. Hansen*, 38 N.Y.2d 17. In that case, the New York Count of Appeals squarely held that a defendant has automatic *standing* to move to suppress evidence when he is criminally charged with its possession. The trial court had ruled that the evidence upon which the possession count to which each of the petitioners had pleaded, seized at 38-25 Parsons Boulevard, had been illegally seized and had granted Velasco's motion to suppress it. The prosecutor did not appeal that order of suppression and did not seriously challenge the fact that the said seizure was illegal and violated Fourth Amendment rights. After receiving petitioners' appellate briefs, the prosecutor, in the face of the apparent success of petitioners' appeals, in his brief and in his oral argument to the Appellate Division argued that in the event that the Appellate Division reverses the judgments of conviction of all or any of the three defendants, Llorente, Doronzoro, and Velasco, and dismisses the counts so pleaded, that it should allow the prosecutor to prosecute the defendants on the remaining counts of the indictment as to each defendant. Following the prosecutor's demands, the Appellate Division reversed the judgments of conviction as to each petitioner, and dismissed the count to

which he had pleaded under his respective indictment, ordered that the indictment be restored to the pre-pleading stage, *infra*, and thus fulfilled the prosecutor's demands which were in violation of the plea bargain.[3]

POINT I

The demands and arguments by the prosecutor to the Appellate Division to be allowed to continue the prosecution of the petitioners on the indictments in the event of a successful appeal by them violated their Constitutional rights under the Fourteenth Amendment.

It was the express agreement of the petitioners, and the prosecutor, which was approved and confirmed by the petitioners and the defendant Velasco to the one count of his respective indictment would cover the entire indictment *with prejudice*. Each defendant, Llorente, Doronzoro, and Velasco, changed their position by reason of that plea, suffered the judgment of conviction to be rendered, and entered upon the service of the jail sentence imposed by the judgment of conviction. The prosecutor exacted the condition that all three defendants must make the plea bargain, and they did. Defendant Velasco was not successful on his appeal to the Appellate Division and his judgment of conviction was affirmed. The prosecutor violated the plea bargain in violation of petitioners' constitutional right to due process of law. *Santobello v. New York*, 404 U.S. 257, 262-263 (1971).

[3] The prosecutor thereafter continued the prosecution of each petitioner.

Those demands by the prosecutor to the Appellate Division in the face of the apparent success of the petitioners' appeals to that court was also an expression of prosecutorial vindictiveness against the petitioners for exercising their right to appeal and violated petitioners' constitutional rights. See, *Blackledge v. Perry*, 417 U.S. 21 (1974); *North Carolina v. Pearce*, 395 U.S. 711 (1969). It is no less a violation of the plea bargain that at the instance of the prosecutor, the Appellate Division made the order restoring the indictment to a pre-pleading stage, as if no plea bargain had been made and as if there was no plea still in existence.

The violation of the plea bargain by the prosecutor by demanding that the Appellate Division order that each petitioner be subjected to further prosecution under his indictment insures that a prosecutor can effectively destroy the petitioners' plea bargain and his right to appeal, since, if the petitioner is successful on appeal, after a plea bargain, he would face further prosecution and a heavier sentence than that bargained for. See, *Blackledge v. Perry*, 417 U.S. 21 (1974).

Unless such violations are precluded, they will render plea bargaining a dangerous, if not a useless precedure, which few defendants would wisely make. The statutory right to appeal becomes illusory, and a trap to ensnare a meritorious plea bargain defendant. To allow a prosecutor to violate his plea bargain agreement would up the ante against a plea bargain defendant who would exercise his right to appeal. See, *Blackledge v. Perry*, 417 U.S. 21 (1974); *North Carolina v. Pearce*, 395 U.S. 711 (1969).

POINT II

The unwithdrawn guilty plea of each petitioner bars further prosecution of the indictment.

A plea of guilty to one count of a multiple count indictment to cover the indictment is the equivalent of an acquittal of the other counts and a plea thus made stands as a barrier to any further prosecution of the indictment. *People v. Griffin*, 7 N.Y.2d 511, 516; *People v. Romer*, 35 A.D.2d 911, 317 N.Y.S.2d 607; 38 A.D.2d 757, 329 N.Y.S.2d 719, 721 (2d Dept.) aff'd 31 N.Y.2d 919 (1972); see *Green v. United States*, 355 U.S. 184, 193 (1957). Also, *N.Y. C.P.L.* Sections 40.31, 220.30.

POINT III

Further prosecution of the indictment violates the petitioners' constitutional rights under the double jeopardy provisions under the Fourteenth Amendment.

Since the plea of guilty to one count of the indictment was made to cover all of the indictment with prejudice, under New York Criminal Procedure Law, Sections 220.30 and 40.30, the petitioners are deemed acquitted of the other counts, and thus no further prosecution may be had under the indictment without violating petitioners' constitutional rights under the double jeopardy provisions under the Fourteenth Amendment.

CONCLUSION

The petition should be granted.

The petition should be granted in order to preserve the integrity and continued value of the plea bargaining procedure. Unless the prosecutor precluded from evading and violating his promises under a plea bargain, the plea bargaining process will become a snare and a trap for defendants. Under the facts in this case, the prosecutor wins even when he loses. The petitioners, and other defendants will be forced to give up their right to appeal from the judgment of conviction even though waiver of that right was not bargained for and would not be waivable as a condition to a plea.

The prosecutor should be compelled to carry out his plea bargain promise.

Respectfully submitted,
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Dated: February 25, 1978.

ORDER OF APPELLATE DIVISION DATED APRIL 19, 1977 AS TO PETITIONER LLORENTE

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 19, 1977

Present—
Hon. Theodore R. Kupferman, Justice Presiding,
Vincent A. Lupiano,
Harold Birns,
Arthur Markewich, Justices.

The People of the State of New York,
Respondent,

-against-

Raul Llorente,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Davis, J.), rendered on November 3, 1976, convicting defendant upon his plea of guilty, of attempted possession of a controlled substance in the third degree, and said appeal having been argued by Mr. Charles Sutton of counsel for the appellant, and by Mr. Richard M. Seltzer of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the judgment so appealed from be and the same is hereby reversed, on the law, the plea vacated, defendant's motion to suppress granted as to drugs found in Apartment 2. Count 5 of the indictment against defendant dismissed, the indictment otherwise reinstated, and the matter remanded for further proceedings.

ENTER: JOSEPH J. LUCCHI,
Clerk.

ORDER OF APPELLATE DIVISION DATED APRIL 19, 1977 AS TO PETITIONER DORONZORO

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 19, 1977

Present—
Hon. Theodore R. Kupferman, Justice Presiding,
Vincent A. Lupiano,
Harold Birns,
Arthur Markewich, Justices.

The People of the State of New York,
Respondent,

-against-

Alvaro Doronzoro,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Davis, J.), rendered on November 3, 1976, convicting defendant, upon his plea of guilty, of possession of a controlled substance in the third degree, and said appeal having been argued by Mr. Charles Sutton of counsel for the appellant, and by Mr. Richard M. Seltzer of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the judgment so appealed from be and the same is hereby reversed, on the law, the plea vacated, defendant's motion to suppress granted as to drugs found in Apartment 2F, Count 20 of the indictment against defendant dismissed; the indictment otherwise reinstated, and the matter remanded for further proceeding.

ENTER: JOSEPH J. LUCCHI
Clerk.

ORDER OF APPELLATE DIVISION DATED APRIL 19, 1977 AS TO DEFENDANT VELASCO

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 19, 1977

Present—
Hon. Theodore R. Kupferman, Justice Presiding,
Vincent A. Lupiano,
Harold Birns,
Arthur Markewich, Justices.

The People of the State of New York,
Respondent,

-against-

Alfonso Velasco,
Defendant-Appellant.

Order of Affirmance on Appeal from Judgment
4492

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Davis, J.), rendered on November 3, 1976, convicting defendant, upon his plea of guilty of criminal possession of a controlled substance in the third degree, and said appeal

having been argued by Mr. Charles Sutton of counsel for the appellant, and by Mr. Richard M. Seltzer of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER: JOSEPH J. LUCCHI, *Clerk.*

Counsel for appellant is referred to
§606.5, Rules of the Appellate
Division, First Department

MEMORANDUM DECISION OF APPELLATE DIVISION DATED APRIL 19, 1977 AS TO DEFENDANT VELASCO

Kupferman, J.P., Lupiano, Birns, Markewich, JJ.
Appeal No. 4492

SUPREME COURT: STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

The People of the State of New York,
Respondent,

-against-

Alfonso Velasco,
Defendant-Appellant.

Judgment, Supreme Court, New York County (Davis, J.) rendered on November 3, 1976, unanimously affirmed. No opinion. Order filed.

MEMORANDUM DECISION OF APPELLATE DIVISION DATED APRIL 19, 1977 AS TO PETITIONERS LLORENTE AND DORONZORO

Supreme Court of the State of New York
Appellate Division: First Department

The People of the State of New York,
Respondent,

-against-

Raul Llorente,
Defendant-Appellant.

Appeal No. 4491

The People of the State of New York,
Respondent,

-against-

Alvaro Doronzoro,
Defendant-Appellant.

Appeal No. 4493

Judgments of the Supreme Court, New York County (Davis, J.) rendered November 3, 1976, following guilty pleas, unanimously reversed on the law, the pleas vacated, defendants' motions to suppress granted as to drugs found in apartment 2F, Count 5 of the indictment against Llorente and Count 20 of the indictment against Doronzoro dismissed, the indictments otherwise reinstated, and the matters remanded for further proceedings.

The defendant Velasco was arrested in connection with a drug investigation of one of two buildings at his disposal for his contraband purposes, for a

previous sale of cocaine to an undercover police officer. The officers, having read him his *Miranda* rights, took him to apartment 2F in that building and conducted a warrantless search and found large amounts of drugs and currency. The defendant Velasco claimed that none of the items belonged to him, and that he was only watching the apartment for someone else. He later agreed to cooperate and gave the information that there were additional items of contraband in the other apartment at the other building, apartment 405. While he consented to a search by signing a form, a search warrant was obtained for apartment 405 by an officer and was executed, and contraband was found in the apartment.

On a motion to suppress, it was granted (Lebittan, J.) only to the extent of the drugs found in apartment 2F where the warrantless search took place. The People now concede that search was unlawful. However, the court refused to suppress Velasco's statement to the authorities or the drugs found in apartment 405. The guilty plea by Velasco was to the criminal possession of a controlled substance in the first degree, in full satisfaction of all counts in the indictment. There was sufficient evidence of his consent to a search and his knoweldge, both in English and Spanish, of what was involved, and suppressing the evidence obtained as a result of searching apartment 2F will not deprive the plea of the essential underlying elements of guilt. However, with respect to Llorente and Doronzoro, unaccountably a plea was accepted with respect to constructive possession of the drugs found in apartment 2F. Their motion to suppress was denied (Coon, J.) on the ground that they lacked standing. We find that they did have standing, *People v. Hansen*, 38 N.Y. 2d 17, and accordingly the count to which they

pleaded, being count 5 in the Llorente indictment, and count 20 in the Doronzoro indictment, should be dismissed, and the accusatory instruments should be restored to the prepleading status, with all the counts therein contained at the time of the plea, except those ordered dismissed. CPL 440.10(7).

We have examined all of the other contentions on this appeal and find them without merit.

Orders filed.

ORDER OF APPELLATE DIVISION DATED JUNE 16, 1977 DENYING LEAVE TO APPEAL TO NEW YORK COURT OF APPEALS AS TO PETITIONERS LLORENTE AND DORONZORO

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 16, 1977.

Present—
Hon. Theodore R. Kupferman, Justice Presiding,
Vincent A. Lupiano,
Harold Birns,
Arthur Markewich, Justices.

The People of the State of New York,
Respondent,

-against-

Raul Llorente,
Defendant-Appellant.

The People of the State of New York,
Respondent,

-against-

Alvaro Doronzoro,
Defendant-Appellant.

M-1940

Each of the above-named defendants-appellants having moved for leave to reargue his appeal from a

judgment of the Supreme Court, New York County, each rendered on November 3, 1976, which judgments were unanimously reversed by separate orders of this Court, each entered on April 19, 1977,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the statement of Charles Sutton in support of said motion, and the statement of Richard M. Seltzer in opposition thereto, and after hearing Mr. Charles Sutton for the motion, and Mr. Richard M. Seltzer opposed,

It is ordered that said motion be and the same is hereby denied.

ENTER: JOSEPH J. LUCCHI, Clerk

ORDER OF APPELLATE DIVISION DATED JUNE 16, 1977 DENYING LEAVE TO APPEAL TO NEW YORK COURT OF APPEALS AS TO DEFENDANT VELASCO

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 16, 1977.

Present—
Hon. Theodore R. Kupferman, Justice Presiding,
Vincent A. Lupiano,
Harold Birns,
Arthur Markewich, Justices.

The People of the State of New York,
Respondent,

-against-

Alfonso Velasco,
Defendant-Appellant.

The above named defendant-appellant having moved for leave to reargue his appeal from a judgment of the Supreme Court, New York County, rendered on November 3, 1976, which judgment was unanimously affirmed by order of this Court entered on April 19, 1977,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the statement of

Charles Sutton in support of said motion, and the statement of Richard M. Seltzer in opposition thereto, and after hearing Mr. Charles Sutton for the motion, and Mr. Richard M. Seltzer opposed,

It is ordered that said motion be and the same is hereby denied.

ENTER: JOSEPH J. LUCCHI, Clerk.

CERTIFICATE OF HON. SOL WACHTLER, ASSOCIATE JUDGE OF NEW YORK COURT OF APPEALS DATED DECEMBER 1, 1977 DENYING PETITIONER LLORENTE'S APPLICATION FOR LEAVE TO APPEAL TO THE NEW YORK COURT OF APPEALS FROM THE ORDER OF THE APPELLATE DIVISION DATED APRIL 19, 1977.

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. SOL WACHTLER, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

RAUL LLORENTE

CERTIFICATE DENYING LEAVE

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

*Description of Order: Judgment of Supreme Court, New York County, November 3, 1976; reversed, on the law, plea vacated, defendant's motion to suppress granted as to drugs found in Apartment, Count 5 of indictment dismissed, indictment otherwise reinstated, and matter remanded for further proceedings to Appellate Division First Department, April 19, 1977.

Dated at Mineola, New York
December 1, 1977

s/Sol Wachtler
Associate Judge

CERTIFICATE OF HON. SOL WACHTLER, ASSOCIATE JUDGE OF THE NEW YORK COURT OF APPEALS DATED DECEMBER 1, 1977 DENYING PETITIONER DORONZORO'S APPLICATION FOR LEAVE TO APPEAL TO THE NEW YORK COURT OF APPEALS FROM THE ORDER OF THE APPELLATE DIVISION DATED APRIL 19, 1977

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. SOL WACHTLER, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

against

ALVARO DORONZORO.

CERTIFICATE DENYING LEAVE

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

*Description of Order: Judgment of Supreme Court, New York County, November 3, 1976; reversed, on the law, plea vacated, motion to suppress granted, Count 20 of indictment dismissed, indictment otherwise reinstated, and matter remanded for further proceeding, Appellate Division, Second Department, April 19, 1977.

Dated at Mineola, New York
December 1, 1977

s/Sol Wachtler
Associate Judge